Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHANDRELLE L. WHITE-PAGE, Individually and as Next Friend of the Minor Children of GLEN PAGE, GLEN PAGE, JR. and MARQUS MIGUEL GLENZELL PAGE, and PERCY PAGE, Individually and as Representative of Estate of GLEN PAGE, Deceased, and LAVERNE CHERRY, Individually and as Representative of the Estate of GLEN PAGE, Deceased,
Petitioner,

v.

HARRIS COUNTY, TEXAS and THE HARRIS COUNTY ORGANIZED CRIME AND NARCOTICS TASK FORCE,
Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners brought this suit pursuant to the provisions of 42 U.S.C. § 1983 and the Texas Tort Claims Act. The Petitioners alleged that their decedent, Glen Page, was shot and killed while working as a confidential informant for Harris County and the Harris County Organized Crime and Narcotics Task Force. The Petitioners contended that Glen Page occupied a "special relationship" with Harris County requiring the County to exercise a high degree of care for his safety and to protect him from injury. Petitioners further alleged that Harris County failed to exercise ordinary care in various respects and had policies regarding the use of confidential informants which demonstrated deliberate indifference to the informants' constitutional rights. Harris County moved for summary judgment, contending that it was entitled to judgment as a matter of law. Petitioners filed a lengthy response in which they asserted, *inter alia*, that Glen Page had a contractual employment relationship with Harris County. Harris County filed a reply brief in which it responded to the Petitioners' new theories of recovery and presented summary judgment evidence in opposition to such theories. Thereafter, the Petitioners were granted leave to file their Third Amended Complaint which included a claim for breach of contract.

The summary judgment evidence showed that in the fall of 1992, Glen Page called the office of the Harris County Organized Crime and Narcotics Task Force to volunteer his services as a paid informant. Prior to the incident in question, Page provided information and assistance in six narcotics cases for which he was paid a total of $3,000.00 by the Task Force. On January 11, 1993, Page accompanied an undercover officer to an apartment located at 7810 Peachtree, Houston, Texas to conduct a "buy-bust" operation. Page entered the apartment and was shot by one of the suspected drug dealers. Page's participation in narcotics undercover operations as a confidential informant was purely voluntary. He was free to cease participation in such activity whenever he wished. *R-Vol. 4, pages 129-130.* The summary judgment evidence further showed that the Harris County Organized Crime and Narcotics Task Force is a multi-jurisdictional, multi-agency project. It is not a Harris County Department. The Task Force is manned by law enforcement officers from a number of different cities and federal agencies as well as Harris County officers. The primary source of funding for the Task Force operations is a grant from the State of Texas which is administered by the City of Baytown. Payments to confidential informants are made by the Task Force and not

by Harris County or any of the participating cities and agencies.[1] *R-Vol. 4, pages 127-128.*

The magistrate judge recommended that Harris County's Motion for Summary Judgment be granted. The district court reviewed the

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[1] Harris County challenges and disputes a number of assertions of fact in the Petition. Harris County submits that the following assertions are not supported by any summary judgment evidence or are based upon mischaracterizations of testimony, speculation or hearsay:

"Page was serving as a C. I. for Harris County" (Petition, p. 3 - 4).

"Harris County and the Task Force recruited Page to help them conduct buy-bust sting operations" (Petition, p. 4).

"Linda Smith _ recruited Page as a C. I." (Petition, p. 4).

"She made _ payments pursuant to a written 'Cooperating Individual Agreement' (the 'C. I. contract')" (Petition, p. 4).

"Harris County _ planned the January 11, 1993 buy-bust" (Petition, p. 5).

"Harris County and the Task Force sent Page into the drug-dealer's crack den" (Petition, p. 5).

"Deputy Smith sent C. I. Page into the suspect's apartment" (Petition, p. 5).

"Analytically, there can be no Task Force policy or custom that exists independent of Respondent Harris County; the policies of the Task Force ***are*** the policies of Harris County" (Petition, p. 14).

"Sending Page into the suspect's apartment was in accord with Harris County's _ customs and policies" (Petition. p. 18).

"Harris County's and the Task Force's decision to twice send Page into a drug-dealer's cocaine den proximately caused his death" (Petition, p. 28).

"Respondents admitted that they deliberately sent Page back into the crack house a second time, _ Informant Page was *obeying orders* from his case officer when he re-entered the fortified apartment" (Petition, p. 28).

magistrate judge's recommendations as well as the Petitioners' objections, and concluded that the magistrate judge's recommendations should be adopted by the court. The Fifth Circuit issued an unpublished *per curiam* opinion affirming the decision of the district court. Regarding the issue of notice to the non-movant of the grounds upon which summary judgment might be granted, the Fifth Circuit stated that "not only did the non-movants have notice, they provided it by writing in depth on an issue that was not even raised in the opposing party's original motion". Further, the Court held that any error in granting the motion with respect to the contract issue was harmless because "Plaintiffs do not claim they have any additional evidence to present and the evidence they have presented does not reflect the existence of a contract". The Fifth Circuit found the "state-created danger" theory inapplicable to the case because "at no time was Page under the 'control' of any Harris County employee in creating the opportunity to complete the transaction". In addition, the Court held that "Plaintiffs have failed to prove that any policy of Harris County, whether written or otherwise, placed Page in a state-created danger".

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court. No direct conflict between the circuits is presented and the issues raised by the Petitioners are not of national importance. Morever, no error in the court below has been shown.

A. *The Breach of Contract Claim*.

The Petitioners contend that the Fifth Circuit erroneously affirmed a *sua sponte* summary judgment on their claim for breach of contract. In that regard the Petitioners assert that they did not receive adequate notice of the district court's intention to dispose of the breach of contract claim. The record reflects that Harris County filed its motion for summary judgment on April 28, 1995. *R-Vol. 4, pages 127-136*. As of that time the Petitioners had filed their First Amended Complaint which did not contain a breach of contract claim or any § 1983 theories other than the special relationship theory. *R-Vol. 4, pages 48-60*. When the Petitioners filed their Second Amended Complaint on May 10, 1995, they made no change in their theories of recovery. *R-Vol. 4, pages 180-192*. Additional theories of recovery appeared for the first time in the Plaintiffs' Response to Harris County's Motion for Summary Judgment. *R-Vol. 3, pages 300-521*. Although "breach of contract" was not expressly included in the

Petitioners' response, the Petitioners did contend that their decedent had a "contractual employment relationship" with Harris County. *R-Vol. 3, page 497.* A breach of contract claim was included when the Petitioners filed their Third Amended Complaint on July 19, 1995. *R-Vol. 2, pages 536-553.* On July 21, 1995, Harris County filed its Reply to Plaintiffs' Response to Motion for Summary Judgment. *R-Vol. 2, pages 554-576.* In that reply brief Harris County contended that there is no evidence whatsoever to support the contention that Glen Page had a contractual employment relationship with Harris County. Harris County noted that the deposition testimony cited by the Petitioners in support of their contention makes reference to only the Task Force, not Harris County. *R-Vol. 2, page 573.* In doing so, Harris County pointed out to the district court that there is an absence of evidence of a contract to support the Petitioners' case. This shifted the burden to the Petitioners to establish the existence of a genuine issue for trial. ***Celotex Corp v. Catrett***, 477 U.S. 317 (1986). When the Petitioners filed their objections to the magistrate judge's memorandum and recommendation, they contended that they had "offered considerable summary judgment proof of the existence of an oral and written contract between Defendant Harris County, the Task Force and the decedent Glen Page". *R-Vol. 1, page 848.* The Petitioners argued this same point again in their First Supplemental Objections to Magistrate Judge's Memorandum and Recommendation and Order of Clarification. *R-Vol. 1, page 875.* After the district court adopted the magistrate judge's recommendations, the Plaintiffs filed a Motion for Reconsideration in which they again contended that they had offered considerable summary judgment proof of the existence of a contract between Glen Page and Harris County. *R-Vol. 1, page 888.* The final judgment in this case was not entered until July 2, 1996. *R-Vol. 1, pages 902-903.* The existence *vel non* of a contract between Glen Page and Harris County had clearly been in issue for almost a year before the final judgment was entered. The Petitioners had ample opportunity to bring forward all of the summary judgment evidence they had, prior to the entry of final judgment.

The parties thoroughly briefed and argued the issue of the contract's existence. Consequently, it cannot be said that the district court disposed of the breach of contract claim *sua sponte*. Compare ***Texas Commerce Bank v. Capital Bancshares, Inc.***, 907 F.2d 1571 (5th Cir. 1990). In any event, the harmless error doctrine applied because the Petitioners did not claim that they had any additional evidence to present and the evidence which they presented to the Fifth Circuit did not reflect

the existence of a genuine issue of material fact. ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 28 F.3d 1388 (5th Cir. 1994). 28 U.S.C. § 2111 requires that "on the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties". Under Texas law "when a cause of action is based on breach of contract, the plaintiff must show that a contract existed between the parties, that the contract created duties, that the defendant breached a duty under the contract, and that the plaintiff sustained damages as a result." ***Snyder v. Eanes Independent School Dist.***, 860 S.W.2d 692, 695 (Tex. App. - Austin 1993, writ denied). See also ***Ryan v. Superior Oil Co.***, 813 S.W.2d 594 (Tex. App. - Houston [14th Dist.] 1991, writ denied). The Petitioners had no evidence whatsoever that Glen Page entered into a contract with Harris County. Moreover, the Petitioners had no evidence that any agreement which Glen Page may have entered into with the Task Force gave him any right to compensation from Harris County. Further, there was no evidence that Glen Page was ever paid by Harris County for information or services. Thus, the Fifth Circuit correctly concluded that the harmless error doctrine applied in this case.

B. *The State-Created Danger Theory.*

Initially, the Petitioners asserted only the "special relationship" theory as a basis for the alleged violation of a constitutional right. However, this Court's decision in ***DeShaney v. Winnebago County Department of Social Services***, 489 U.S. 189 (1989), negated this theory of recovery since Glen Page was not in state custody when he was injured. As this Court said in ***DeShaney,*** "the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." 489 U.S. at 200. Some courts of appeals have recognized the "state-created danger" theory as a basis for establishing a constitutional claim despite the absence of a special relationship. Although it can be argued that this theory threatens to transform the Constitution into a tort claims act and should not be adopted in any case, it certainly should not be applied in a case such as the instant case. Glen Page voluntarily became a confidential informant for the Task Force. Regardless of the degree of risk he confronted in working as an informant, no state actor coerced or forced him to do anything. If

private citizens who voluntarily act as informants have a "constitutional" right to protection, law enforcement officers and other government employees who regularly confront dangerous situations as a part of their work must necessarily have the same right. However, this Court's decision in ***Collins v. City of Harker Heights, Texas***, 503 U.S. 115 (1992) makes clear that the Due Process Clause does not provide any such right to government employees who voluntarily accept offers of employment. The Court held that neither the text nor the history of the Due Process Clause supported the plaintiff's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. Quoting from the Court's opinion in ***DeShaney***, the Court stated the following:

> The Clause is phrased as a limitation on a State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law', but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

503 U.S. at 126-127. Pointing out the custodial nature of the circumstances in prior cases, the Court said the plaintiff could not maintain "that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment". 503 U.S. at 128. Likewise, if Glen Page had any relationship with Harris County (which Harris County denies), it was a relationship into which Page voluntarily entered and therefore no deprivation of liberty can be claimed.

Harris County submits that even courts of appeals who allegedly recognize the state created danger theory would not apply it in this case. The Tenth Circuit would conclude that the facts of this case do not " 'shock the conscience' so as to rise to the level of a substantive due process violation". ***Uhlrig v. Harder***, 64 F.3d 567, 573 (10th Cir. 1995). The Eleventh Circuit would decline to apply the theory on the ground that "the key concept is the exercise of coercion, dominion, or restraint by the state". ***Wideman v. Shallowford Community Hosp., Inc.***, 826 F.2d 1030,1035 (11th Cir. 1987). The Sixth Circuit would say that "it was not the defendants who took [Glen Page] captive and [shot him]; it was [the

drug dealer]. [The drug dealer] was not acting under color of any state 'statute, ordinance, regulation, custom or usage'_ and the outrage suffered by [Glen Page] is simply not compensable in a federal civil rights action". ***Nobles v. Brown***, 985 F.2d 235,238 (6th Cir. 1992). The Seventh Circuit would find the theory inapplicable because no "press gang" had picked Glen Page from the streets and forced him to be an informant. He enlisted, on terms he found satisfactory, and he was free to quit whenever he pleased. The Court would respond to the Petitioners' reliance upon its opinion in ***Bowers v. DeVito***, 686 F.2d 616 (7th Cir. 1982) by saying again that "the state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten". ***Walker v. Rowe***, 791 F.2d 507,511 (7th Cir. 1986). It is only when the plaintiff's involvement with the state is involuntary that the state created danger theory has or should have any application.[2] To hold otherwise is to blur the "significant distinction between a tort and a *constitutional* wrong". ***de Jesus Benavides v. Santos***, 883 F.2d 385 (5th Cir. 1989) (prison guards attacked by inmates have no § 1983 cause of action).

Regardless of the viability of the state-created danger theory, there was no evidence to establish any liability against Harris County in this case. A municipality or political subdivision may not be held vicariously liable for an injury inflicted solely by its employees or agents. It is only when the execution of a government's policy inflicts the injury that the government is responsible under § 1983. ***Monell v. Department of Social Services***, 436 U.S. 658 (1978). The Petitioners failed to offer any summary judgment evidence of a county policy which reflected deliberate indifference toward the safety of Glen Page and which was the moving force causing a constitutional violation. Although the Petitioners claim that the record contains evidence regarding Harris County policy, the deposition testimony relied upon by the Petitioners as summary judgment evidence pertained to the Task Force. Further, it does not establish a "constitutional" violation. In that regard, the evidence offered by the Petitioners did not reflect the existence of policies which could be characterized as arbitrary, or conscience-shocking, in a constitutional sense. All of the matters asserted by the Petitioners are analogous to typical state law tort claims. Consequently, they cannot be asserted under the Due

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2 See for example the factual circumstances involved in ***Wood v. Ostrander***, 879 F.2d 583 (9th Cir. 1989) (police officer arrested driver of car and deserted passenger in high crime area in middle of night).

Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. ***Collins v. City of Harker Heights, Texas*** *supra.*

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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